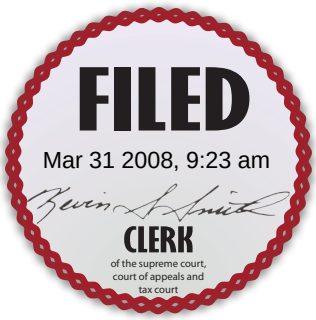

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IN THE
COURT OF APPEALS OF INDIANA

APRIL M. HINES,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 02A03-0704-CV-193
	)	
TIMOTHY A. HINES,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ALLEN CIRCUIT COURT
The Honorable John D. Cowan, Judge Pro Tempore
Cause No. 02C01-0504-DR-349

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

This appeal arises out of a decree of dissolution of the marriage between April M. Hines ("Wife") and Timothy A. Hines ("Husband"), and a subsequent order granting in part and denying in part Wife's motion to correct error. Wife appeals, raising the following restated issues:

I. Whether the trial court erred in denying Wife's request for appointed counsel.

II. Whether the trial court abused its discretion in denying Wife's motion for continuance of the final hearing on the matter of the dissolution of the parties' marriage.

III. Whether the trial court erred in denying Wife's request for spousal maintenance.

IV. Whether the trial court erred in dividing the marital estate.

V. Whether the trial court abused its discretion by failing to order Husband to pay Wife's attorney fees.

VI. Whether the trial court properly determined Husband's child support obligation.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married in April 1981. On April 20, 2005, Husband filed a petition for dissolution of marriage. At that time, two of the couple's four children were not yet emancipated. On May 25, 2005, the trial court issued Provisional Orders of the Court, which included that Husband: (1) pay Wife "temporary child support for the benefit of the children in the amount of $224[] per week;" (2) pay "temporary spousal maintenance of: the monthly mortgage payment on the marital residence, and all expenses (loan, maintenance, insurance, taxes) related to the Pontiac Transport auto (except for gasoline);" and (3) "pay an

award of $1,000[] of said attorney fees to [Wife], which award is in the nature of, and related to child support." *Appellant's App.* at 34-36.

In March 2006, when the couple had only one remaining unemancipated child, the trial court issued an order that, in part: (1) modified Husband's temporary child support payments from $224 to $207 per week; and (2) found Husband in contempt of court for failing to comply with various terms of the May 2005 order. *Id*. at 42-43. The trial court also issued a Pre-Trial Conference Order, which set forth the issues for trial as custody, child support, spousal maintenance, property/debt division, and attorney fees. *Appellant's App.* at 39. In a Case Management Order, the trial court set the date for the final hearing on the matter of the dissolution of the parties' marriage. *Id*. at 47.

Wife's attorney, Michael T. Yates, advised her of his intention to withdraw his appearance as counsel. *Id*. at 20. In mid-October 2006, the trial court granted Yates's motion to withdraw. *Id*. at 8. On December 29, 2006, Wife, acting pro se, filed a Verified Motion for Continuance seeking to postpone the January 3 hearing. Wife provided the following reasons for needing additional time:

> My attorney quit on October 16, 2006, Michael T. Yates (I have a note from my doctor regarding my health) . . . I have no funds to hire another and have been denied free legal aid. I am unemployed [due] to my health problem & I am [too] ill to go to court at this time . . . .

Appellant's App. at 48.

On the morning of the final hearing, Wife telephoned the court to report that she would not attend the 9:00 a.m. hearing. Ten minutes before the hearing was scheduled to start, Wife called a second time "to inform the court that she was on her way." *Tr*. at 4. The

trial court began the hearing at 9:15 a.m., noted that Wife was not present, but explained that she would be in attendance. As the first order of business, the trial court denied Wife's motion for a continuance with the following comments:

> [Wife] is not present in the courtroom. She did file [her continuance] on December 29th basically asking for time to get an attorney. Actually asked the court to appoint an attorney for her. The court will not appoint attorneys in divorce cases. Also the fact that she received her, her attorney withdrew from her case back in I believe October 16, 2006. Pursuant to local rules sent her a letter on October 6, 2006, advising her of his intention to withdrawal [sic] his appearance. It's been almost three months since that time and then she petitioned her Verified Motion for Continuance, it was not filed until December 29, 2006, said motion is denied.

Tr. at 5-6.

At the start of Wife's case in chief, Wife attempted to address her Motion for Continuance. The trial court noted that the motion had been denied earlier and explained:

> The reasons I stated were a, the main thing was it was filed December 29th. The hearing is today, January 3rd. Your attorney withdrew almost 3, 2 1/2 months ago, gave you notice of that almost three months ago on October 6th. So you've had plenty of opportunity to file for a continuance. It was addressed on the eve of trial and so that's why the continuance was denied.

Id. at 94-95. Following the hearing, the trial court issued a Decree of Dissolution of Marriage. The parties each filed a motion to correct errors and the trial court held a hearing. Thereafter, the trial court granted Wife's motion in part on the basis of a scrivener's error, but denied Husband's motion. Wife now appeals.

DISCUSSION AND DECISION

I. Request for Appointed Counsel

Wife contends that the trial court erred in refusing her request for appointed counsel. Specifically, she contends that the evidence was uncontradicted that she was in poor health, needed an attorney, and had insufficient funds to hire her own attorney.

IC 34-10-1 governs a trial court's determination of whether to grant a request for appointed counsel. This determination does not focus on the applicant's health, but instead on her indigence. "An indigent person who does not have sufficient means to . . . defend an action may apply to the court in which the action . . . is pending, for leave to . . . defend as an indigent person." IC 34-10-1-1.

Prior to March 26, 2002, IC 34-10-1-2 provided:

> If the court is satisfied that a person who makes an application described in [IC 34-10-1-1] does not have sufficient means to prosecute or defend the action, the court *shall*:
>
> (1) admit the applicant to prosecute or defend as an indigent person; and
>
> (2) assign an attorney to defend or prosecute the cause.

(emphasis added). In *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001), our Supreme Court analyzed the above version of this statute to determine whether counsel should be appointed for an indigent respondent in a divorce proceeding. Following the plain language of the statute, the Court determined that counsel *must* be appointed once a court determines that a person is indigent and lacks sufficient means to prosecute or defend a civil action. *Id*. at 159.

Apparently in response to the Supreme Court's decision in *Sholes*, the legislature amended IC 34-10-1-2. *See Sims v. Ivens*, 774 N.E.2d 1015, 1018 n.1 (Ind. Ct. App. 2002). The amended version provides in pertinent part as follows:

> (b) If the court is satisfied that a person who makes an application described in [IC 34-10-1-1] does not have sufficient means to prosecute or defend the action, the court:
>
> (1) *shall* admit the applicant to prosecute or defend as an indigent person; and
>
> (2) *may*, under exceptional circumstances, assign an attorney to defend or prosecute the cause.
>
> . . . .
>
> (d) The court *shall* deny an application made under [IC 34-10-1-1] if the court determines any of the following:
>
> (1) The applicant failed to make a diligent effort to obtain an attorney before filing the application.
>
> (2) The applicant is unlikely to prevail on the applicant's claim or defense.

(emphasis added). This amendment changed the trial court's appointment of counsel for an indigent from a mandatory act to a discretionary appointment, which is allowed where "exceptional circumstances" exist. IC 34-10-1-2(b)(2). The amendment also now requires the trial court to deny a request for appointed counsel if the applicant: (1) failed to make a diligent effort to obtain counsel; or (2) is unlikely to prevail on the claim. IC 34-10-1-2(d).

Wife contends that the trial court erred in denying her request for counsel without making a finding that she was indigent. While IC 34-10-1-2 gives the trial court discretion to appoint counsel upon a finding that an applicant is indigent, such discretion is removed

where, like here, the applicant failed to make a diligent effort to obtain an attorney before filing the application. IC 34-10-1-2(d). Wife presented no evidence that she made a diligent effort to obtain an attorney, which she was "required to do in order to obtain appointed counsel." *Smith v. Harris*, 861 N.E.2d 384, 386 (Ind. Ct. App. 2007), *trans. denied*. The trial court did not err in declining to appoint counsel to represent Wife.[1]

II. Motion for Continuance

Wife next contends that the trial court erred in summarily denying her motion for continuance. The decision to grant or deny such a motion rests within the sound discretion of the trial court. *Troyer v. Troyer*, 867 N.E.2d 216, 219 (Ind. Ct. App. 2007); *Thompson v. Thompson*, 811 N.E.2d 888, 907 (Ind. Ct. App. 2004), *trans. denied*. An abuse of discretion may be found in the denial of a motion for continuance when the moving party has shown good cause for granting the motion. *Troyer*, 867 N.E.2d at 219; *Thompson*, 811 N.E.2d at 907. However, no abuse of discretion will be found when the moving party has not demonstrated that he or she was prejudiced by the denial. *Troyer*, 867 N.E.2d at 219. The withdrawal of an attorney does not automatically entitle a party to a continuance. *Id*.; *Thompson*, 811 N.E.2d at 907.

In her motion for continuance, Wife alleged that she was unemployed due to health reasons, and supported this claim with a note from her doctor. She further contended that she

[1] Wife also contends that the trial court erred in denying her request for counsel on the basis that the case was a divorce proceeding. We need not address this issue where, like here, Wife failed to show she had made a diligent effort to obtain counsel prior to making her request for appointment of counsel.

did not have sufficient funds to hire an attorney, had been denied free legal aid, and needed time "for the judge to appoint an attorney." *Appellant's App.* at 48.

After the trial court denied Wife's motion for continuance, Wife filed a motion to correct error stating that the trial court had erred in denying her motion "for the reason that [Wife] needed additional time to secure counsel and because of her illness as documented by her physician she was not able to effectively represent herself in a hearing without the assistance of counsel." *Appellant's App.* at 50. The trial court denied Wife's motion to correct error citing the sufficient time she had to obtain replacement counsel during the three months following her attorney's October withdrawal. *Appellant's App.* at 30.

Here, Husband filed the dissolution proceedings in April 2005. From June 2005 through January 2006, attorney Angela Snyder represented Wife. In January 2006, Snyder withdrew, and Yates filed his appearance. Yates continued as Wife's counsel until mid-October 2006. In her motion to correct error, Wife provided no details as to the diligent efforts she had made in the intervening months to seek counsel. Additionally, Wife did not demonstrate that she had been prejudiced by the denial. *Troyer*, 867 N.E.2d at 219.

The trial court was faced with balancing Wife's need for more time to find counsel with the trial court's need to maintain the court's calendar and bring finality to proceedings, which had been pending for almost twenty-one months. Additionally, the case involved the issue of custody for the parties' unemancipated child. We cannot say that the trial court abused its discretion in denying Wife's motion for continuance, which was filed on the eve of trial—a date that was three months after Wife learned of her attorney's decision to withdraw from the case.

III. Spousal Maintenance

Wife argues that the trial court erred by failing to award incapacity maintenance and rehabilitative maintenance pursuant to IC 31-15-7-2. Husband contends that, because this issue was not raised at the final hearing, Wife has waived this issue on appeal. *McGill v. Ling*, 801 N.E.2d 678, 687 (Ind. Ct. App. 2004), *trans. denied*. We disagree. While Wife did not specifically use the term "spousal maintenance" in her argument to the trial court, we find the following request sufficient to put the matter into issue:

> I am not, and I have not worked for at least nine years and I worked for eight months and was fired due to illness. He will state to that. Most of my marriage I haven't worked. They're claiming that I haven't worked. I've been a stay at home mom. I have raised four kids. Tim has worked afternoons most of that time. I was the primary caretaker of my children and got ill. I cannot get another job. I was, but the illness that I have nobody will hire me. It is very expensive to get my medicine. . . . He wanted me to stay home and take care of our children. I did what he wanted me to do. It's not fair to expect me to go out and find a job when I have supported him . . . .

Tr. at 158-59.

"A maintenance . . . award is designed to help provide for a spouse's sustenance and support." *Matzat v. Matzat*, 854 N.E.2d 918, 920 (Ind. Ct. App. 2006); *McCormick v. McCormick*, 780 N.E.2d 1220, 1224 (Ind. Ct. App. 2003). In the absence of an agreement between the parties, the trial court's authority to order maintenance is limited to three options: (1) incapacity maintenance for a spouse who cannot support himself or herself; (2) caregiver maintenance for a spouse who must care for an incapacitated child; and (3) rehabilitative maintenance for a spouse who needs additional education or training before seeking a job. IC 31-15-7-2; *Cannon v. Cannon*, 758 N.E.2d 524, 525-26 (Ind. 2001) (citing *Voigt v. Voigt*, 670 N.E.2d 1271, 1276-77 (Ind. 1996)). Here, there was no evidence

presented to the court that their son is incapacitated or that Wife needs additional education and training in order to find a job; therefore, Wife's only claim can be one of incapacity support under IC 31-15-7-2(1).[2]

A trial court's decision to award maintenance is purely within its discretion, and we will only reverse if the award is against the logic and effect of the facts and circumstances of the case. *Matzat*, 854 N.E.2d at 920; *Augspurger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004). Pursuant to IC 31-15-7-2(1), the trial court may order incapacity maintenance "[i]f the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected . . . ." *See Bizik v. Bizik*, 753 N.E.2d 762, 768 (Ind. Ct. App. 2001), *trans. denied* (2002). However, even if a trial court finds that a spouse's incapacity materially affects her ability to support herself, a maintenance award is not mandatory. *Id*. at 769; *In re Marriage of Richmond*, 605 N.E.2d 226, 228 (Ind. Ct. App. 1992).

We have recognized that the maintenance statute creates a flexible standard that allows a trial court to consider whether any incapacity significantly affects a spouse's ability to support himself or herself and that the degree of employability is an inextricable factor in

---

[2] IC 31-15-7-2, in pertinent part, provides:

> A court may make the following findings concerning maintenance:
>
> (1) If the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the incapacitated spouse to support himself or herself is materially affected, the court *may* find that maintenance for the spouse is necessary during the period of incapacity, subject to further order of the court.
>
> . . . .

(emphasis added).

this determination. *McCormick*, 780 N.E.2d at 1224 n.6; *see In re Marriage of Dillman*, 478 N.E.2d 86, 88 (Ind. Ct. App. 1985). "'A spouse may suffer an affliction which would only minimally affect the self-supportive ability of a highly skilled person. That same malady, however, may materially affect the self-supportive ability of one who, even without the incapacity, is marginally employable, or only employable in physically demanding jobs.'" *McCormick*, 780 N.E.2d at 1224 n.6 (quoting *In re Dillman*, 478 N.E.2d at 88).

In determining whether a trial court has abused its discretion in a spousal maintenance determination, this court will presume that the trial court properly considered the applicable statutory factors in reaching its decision. *Bizik*, 753 N.E.2d at 769; *Moore v. Moore*, 695 N.E.2d 1004, 1007 (Ind. Ct. App. 1998). The presumption that the trial court correctly applied the law in making an award of spousal maintenance is one of the strongest presumptions applicable to the consideration of a case on appeal. *Bizik*, 753 N.E.2d at 769; *Fuehrer v. Fuehrer*, 651 N.E.2d 1171, 1174 (Ind. Ct. App. 1995), *trans. denied* (1996).

In *Matzat*, while we recognized that the receipt of social security benefits could support the award of incapacity maintenance, we ultimately held that without *any* medical evidence of a disability and only two applications for social security, one of which was denied, the trial court abused its discretion in awarding spousal maintenance *Matzat*, 854 N.E.2d at 920-21. Here, Wife stated that she was too sick to work and that she had been fired from a job due to her illness. *Tr*. at 100-05. Further, Wife's mother testified as to the extent of Wife's illness saying, "[s]he is unable to do much of anything," and that "stress is very hard on [her] and this divorce has caused a lot of stress." *Id*. at 140, 142. While these statements provided evidence that Wife was not well, there was no evidence regarding

exactly what Wife's ailments were or whether Wife's ailments were significant enough to warrant disability maintenance. Here, we do not find that the trial court's decision was against the logic and effect of the facts and circumstances before it. *See Matzat*, 854 N.E.2d at 920.

IV. Division of the Marital Estate

Wife next argues that the trial court erred in its division of the marital estate. The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of that discretion. *J.M. v. N.M.*, 844 N.E.2d 590, 602 (Ind. Ct. App. 2006), *trans. denied* (citing *Woods v. Woods*, 788 N.E.2d 897, 900 (Ind. Ct. App. 2003)). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *Id*. (citing *Daugherty v. Daugherty*, 816 N.E.2d 1180, 1187 (Ind. Ct. App. 2004)). When we review a challenge to the trial court's division of marital property, we may not reweigh the evidence or assess the credibility of witnesses, and we will consider only the evidence most favorable to the trial court's disposition of marital property. *Id*. Moreover, the challenger must overcome a strong presumption that the court considered and complied with the applicable statutes, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Id*.

In her motion to correct error, Wife argued that the trial court erred in its valuation of the marital assets and liabilities. *Appellant's App.* at 51. Furthermore, Wife asserted that the presumption in favor of equal distribution of marital property had been rebutted. Pursuant to IC 31-15-7-5, a trial court may deviate from the statutory presumption of equal distribution if

a party presents relevant evidence to rebut the presumption. Relevant evidence includes evidence of: (1) each spouse's contribution to the acquisition of property; (2) acquisition of property through gift or inheritance prior to the marriage; (3) the economic circumstances of each spouse at the time of disposition (including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children); (4) each spouse's dissipation or disposition of property during the marriage; and (5) each spouse's earning ability. IC 31-15-7-5; *Chase v. Chase*, 690 N.E.2d 753, 756 (Ind. Ct. App. 1998).

In the present case, the trial court divided the relatively few assets and gave each spouse an equal share. As part of this, the trial court ordered the family house, in which Wife and son resided, "shall be the sole and separate property of the [Husband]." *Appellant's App.* at 26. We note that IC 31-15-7-5 provides that "marital property shall be divided 'in a just and reasonable manner,' and the term 'just' invokes a concept of fairness and of not doing wrong to either party; however, 'just and reasonable' does not necessarily mean equal or relatively equal." *Doyle v. Doyle*, 756 N.E.2d 576, 578 (Ind. Ct. App. 2001) (quoting *Swinney v. Swinney*, 419 N.E.2d 996, 998 (Ind. Ct. App. 1981), *trans. denied*).

Here, the trial court heard evidence that: (1) the marriage lasted almost twenty-four years—from October 1981 until April 2005—and produced four children; (2) Wife was not employed and had not been employed for most of the marriage; and (3) Husband had significantly higher earnings and earning ability. The trial court found it "is in the best interest of the parties' minor child that [Wife] shall have and retain custody of said minor child." *Appellant's App.* at 21. Even so, the trial court designated the house as Husband's

share of the marital assets. In light of the evidence of the longevity of the marriage and of Wife's lower earning potential, it was error for the trial court to equally divide the marital estate. We remand with instructions to the trial court to grant Wife seventy percent of the marital estate and Husband thirty percent.

V. Attorney Fees

Wife next argues that the trial court erred in failing to order Husband to pay her attorney fees. IC 31-15-10-1 provides:

> (a) The court periodically may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees and mediation services, including amounts for legal services provided and costs incurred before the commencement of the proceedings or after entry of judgment.
>
> (b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's own name.

"The attorney fees statute in connection with dissolution proceedings is discretionary: it provides that the trial court may order a party to pay a reasonable amount for the other party's attorney fees." *Tompa v. Tompa*, 867 N.E.2d 158, 166 (Ind. Ct. App. 2007); *see Thompson*, 811 N.E.2d at 927-28. "In determining whether to award attorney fees, the trial court must consider the resources of the parties, their economic conditions, the ability of the parties to engage in gainful employment, to earn adequate income and other factors that are pertinent to the reasonableness of the award." *Tompa*, 867 N.E.2d at 166; *Thompson*, 811 N.E.2d at 927-28.

In its Order Regarding Petitioner's Motion to Correct Error, the trial court found that Wife "never requested [Husband] to pay any of her attorney fees and never testified as to any

outstanding fees that were due." *Appellant's App.* at 31. This court will reverse the trial court's decision regarding the award of attorney fees "only if the court's decision is clearly against the logic and effect of the facts and circumstances." *In re Marriage of Bartley*, 712 N.E.2d 537, 546 (Ind. Ct. App. 1999).

From the evidence, it was clear that Husband made significantly more money than Wife. While a disparity of income may be considered in awarding attorney fees, a trial court is not required to award fees based on disparity of income alone. *Russell v. Russell*, 693 N.E.2d 980, 984 (Ind. Ct. App. 1998), *trans. denied*. Here, Wife represented herself at the hearing and presented no evidence regarding the fees that she had paid or still owed to her attorneys.[3] Therefore, the trial court did not abuse its discretion in failing to award such fees.

VI. Child Support

Wife next argues that the trial court erred in failing to make a finding as to child support arrearage. Wife insists that the trial court's intention, as reflected in its March 16, 2006 order, was to defer the issue of arrears. *Appellant's Br*. at 18, *Appellant's App.* at 43. However, Wife fails to note that the trial court placed the responsibility on the parties to "attempt to resolve the arrears . . . and submit either a stipulation regarding said arrears or a statement indicating that their attempts to stipulate were not successful, within thirty days" of the March 2006 order. *Appellant's App.* at 43.

[3] In her brief, Wife insists that she "testified that she had $5,000[] in legal fees." *Appellant's Br*. at 17. However, Wife fails to cite to that testimony in the transcript. While we find a reference to child support charges of $5,000, *Tr*. at 99, we find no reference to attorney fees in that amount.

The trial court set forth in its three orders the calculated amount of child support. The May 2005 Provisional Order provided that Husband pay child support in the amount of $224 per week, effective May 5, 2005. *Appellant's App.* at 34, 37. This amount was modified in the March 16, 2006 order to require Husband to pay $207 per week, effective September 1, 2005. *Id*. at 42, 45. Finally, the Decree of Dissolution of Marriage provided that Husband pay child support in the amount of $150 per week, effective January 26, 2007. *Id*. at 23, 28. While the Decree ordered the child support payments to be made effective January 26, 2007, this order did not release Husband from his prior obligations of unpaid child support.

These three orders set forth that Husband would pay child support directly to the Indiana Child Support Bureau, and directed that an income withholding order be issued to Husband's employer. The parties should be able to readily calculate the amount of child support, if any, that Husband still owes. Husband has not been released from paying child support due under the previous orders. The trial court did not have sufficient evidence regarding payments of child support made by Husband. Therefore, the trial court did not err in failing to make a finding regarding child support arrears.

Wife also contends that the trial court "erred in its calculation of child support in the amount of $150.46 per week due to its finding that [Husband] earned only $1,120.00 per week."[4] *Appellant's App.* at 52. Wife contends that said finding was contrary to the evidence and, therefore, said support calculation was contrary to law. *Id.*

[4] Although Wife did not address this issue in her brief, she raised it in her Motion to Correct Error, and Husband chose to address this issue in his brief. We therefore address this issue. *Appellant's App.* at 52.

Our standard of review for child support awards is well settled. *McGill v. McGill*, 801 N.E.2d 1249, 1251 (Ind. Ct. App. 2004). "We begin with the understanding that support calculations are made utilizing the income shares model set forth in the Indiana Child Support Guidelines" (the "Guidelines"). *Id*. The Guidelines apportion the cost of supporting children between the parents according to their means. *Id*. A calculation of child support under the Guidelines is presumed to be valid. *Id*. Therefore, we will not reverse a support order unless the determination is clearly against the logic and effect of the facts and circumstances. *Id*. When reviewing a child support order, we do not revisit weight and credibility issues but confine our review to the evidence while reasonable inferences favorable to the judgment are considered. *Id*.

The evidence before the court was that Husband earned $28 per hour and worked a 40-hour week, for a weekly salary of $1,120 per week. *Tr*. at 8, *Pet'r's Ex*. 1. While Wife asserted that Husband earned approximately $1,600 per week ($83,000 per year), *Tr*. at 93, Wife introduced no evidence to support this claim. The trial court did not err in basing the child support payments on Husband's salary of $1,120 per week.

Affirmed in part, reversed in part, and remanded.

ROBB, J., and BARNES, J., concur.